

NORTH DELTA WATER AGENCY

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The Honorable Phil Isenberg
Chair, Delta Vision Blue Ribbon Task Force
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Dear Mr. Isenberg:

I am writing to you in my capacity as President of the Board of Directors of the North Delta Water Agency (NDWA). The purpose of this letter is to provide the Delta Vision Task Force with a better understanding of NDWA's role in the management of water resources within the Sacramento-San Joaquin Delta. We wish to ensure that the Task Force gives due respect and consideration to the rights and interests of NDWA and its constituents in identifying the Task Force's strategy for managing the Delta as a sustainable ecosystem and recommendations concerning the future of the Delta. NDWA looks forward to working with the Task Force to ensure that new programs for resolving longstanding Delta resource issues reflect the needs and concerns of the water users within NDWA's boundaries.

History and Purpose of NDWA

NDWA was formed by a special act of the California Legislature in 1973 (North Delta Water Agency Act, Chapter 283, Statutes of 1973) as part of the solution to one of the most substantial problems in California since the 1940s: the impact of constructing the Central Valley and State Water Projects (Projects) on agricultural interests along the Sacramento River and in the Delta. Long before the U.S. Bureau of Reclamation (Bureau) raised Shasta Dam, farmers in those communities had developed thriving agricultural operations in reliance on water rights in the Sacramento River. Damming the river's major tributaries posed a grave threat to those prior right holders. As a result, water user associations held extensive negotiations with the United States to protect their rights, which led to cooperative studies of the CVP's effect on the flow that had been available under natural conditions. Relying on these studies, the Bureau executed settlement contracts with Sacramento River interests, generally guaranteeing historical water supplies and arranging for purchases of supplemental water.

But due to the more complex issues of both water quantity and quality in the Delta, the Bureau postponed settling with right holders in the North Delta. In critically dry water years, despite the significant prior water rights in the North Delta area, flow releases by the CVP may be inadequate to sustain the necessary water quantity and quality throughout the year. Matters only intensified with the commencement of operation of the State Water Project under the Department of Water Resources (DWR).

To facilitate a settlement contract with the Bureau and/or DWR, representatives in the northern part of the Delta requested that the Legislature establish an agency to represent northern Delta interests, which ultimately became NDWA.¹ From 1974 to 1979, NDWA, the Bureau and DWR determined the outflow necessary to meet water quality standards and generally reviewed the paramount water rights of landowners within NDWA boundaries. The agencies also evaluated the Delta channels' historical function as natural seasonal storage. Before the Projects began withholding much of the Sacramento River system's high winter flows, the Delta channels stored sufficient fresh water to sustain water quality in the northern Delta throughout and often beyond the irrigation season. Since the Projects commenced, however, the Delta functions more like a flowing stream. As a result, relatively minor decreases in outflow can have a serious impact on northern Delta water quality.

Based on these studies, DWR and NDWA agreed on settlement terms that would prevent much of the Projects' detrimental effect on NDWA right holders. (By that time, the Bureau had decided against contracting with individual parties to meet water quality standards.) These terms formed the basis of the 1981 Contract for the Assurance of a Dependable Water Supply of Suitable Quality (1981 Contract), a copy of which is enclosed with this letter. The terms and conditions of the 1981 Contract are summarized below.

To summarize, NDWA encompasses the entire jurisdictional Delta within Sacramento, Solano and Yolo Counties, as well as part of northwestern San Joaquin County. NDWA encompasses more of the Delta than any other local agency. NDWA also administers one of the most significant water right settlement contracts in the Delta, in furtherance of the California Legislature's goal of protecting water rights and water quality for Delta farmers and municipal users.

The 1981 Contract

The 1981 Contract is essentially a guarantee by the State of California that, on an ongoing basis, suitable water will be available in the northern Delta for agriculture and other beneficial uses. To that end, the contract requires DWR to operate the State Water Project to meet water quality criteria for the Delta channels within NDWA's boundaries while guaranteeing the water rights of NDWA landowners against any challenge by the State of California. In return, NDWA makes an annual payment to DWR.

The contract's water quality criteria are in effect year-round; by contrast, the State Water Resources Control Board's 1995 Water Quality Control Plan salinity objectives are in effect only from April 1 to August 15. The 1981 Contract criteria are measured at multiple monitoring stations throughout the North Delta, including the Sacramento River at Three Mile Slough, Rio Vista and Walnut Grove; North Fork Mokeulmne at Walnut

¹ "The general purposes of the agency shall be to negotiate, enter into, executed, amend, administer, perform and enforce one or more agreements with the United State and with the State of California . . . To protect the water supply of the lands within the agency against intrusion of ocean salinity; and . . . To assure the lands within the agency of a dependable supply of water of suitable quality sufficient to meet present and future needs." (Agency Act § 4.1.)

Grove; Mokelumne at Terminous; and San Joaquin River at San Andreas Landing. Because it does not terminate except by mutual agreement of the parties, the 1981 Contract will have a continuing influence on Delta water quality. The 1981 Contract further obligates the State to defend the use of water required to provide and sustain the water quality criteria and usage of water within the northern Delta.

Regarding water supply, the 1981 Contract recognizes the legal right of NDWA water users to divert water from Delta channels for agricultural, municipal and industrial purposes, and states that the State shall furnish such water as is required within NDWA boundaries. The Contract thus ensures that NDWA landowners need not curtail diversions to meet, for example, the Water Quality Control Plan objectives. In a 1998 Memorandum of Understanding, DWR recognized its legal responsibility for meeting any objectives that the State Water Resources Control Board may assign to any right holder within the boundaries of NDWA.

While the 1981 Contract is one between two public agencies, it must be recognized that there are individual private rights involved as well. The Contract anticipates Subcontracts between NDWA and individual landowners which pass on the rights and obligations under the Contract to the lands described in the Subcontract. Many of these have been signed and recorded. The 1981 Contract has therefore Constitutional protection of private contract, and is not subject, for example, to a legislative dissolution of NDWA.

NDWA's Interests in the Delta Vision Process

As strategies are being developed to address the complex problems facing the Delta, it will be critical for the State to recognize and honor its obligations under the 1981 Contract. The Contract's water quality and supply guarantees are crucial to the continued success of northern Delta agriculture, which is the backbone of the region's economy and history, and fundamental to its continued vitality as a community as well as its municipal water supply.

Some interim measures proposed for the northern Delta, however, may interfere with the beneficial use of water under the 1981 Contract. For example, the measures "Restore Floodplain Habitat and Fish Migration Through the Yolo Bypass" and "Restore and Enhance the Cache Slough Region" would force habitat enhancements in Cache Slough and the Yolo Bypass. The Cache Slough area is home to some of the oldest agricultural operations in Solano County. Farming also occurs in most of the Yolo Bypass. Yet current measures call for introducing shallow flooding into these areas to serve as spawning habitat and promote growth of organisms that serve as a food source for the threatened delta smelt and other native fish. Intentionally luring and fostering greater numbers of federally-protected fish species into the northern part of the agriculturally productive Delta would be tantamount to exporting an environmental problem from one region to another. This would not only be unwise from a policy standpoint; it would run contrary to the letter and spirit of the 1981 Contract, which was intended to preserve a viable agricultural economy within NDWA.

As in the South Delta, the water supply assured under the 1981 Contract is diverted through a network of private and public siphons, pumping plants, and other intake facilities. A State-sponsored project to convert the North Delta into new delta smelt habitat could potentially make it much more difficult to divert water without installing numerous cost-prohibitive positive barrier fish screens. Because the State and Federal Endangered Species Acts prohibit "take" of protected species, including the smelt, the current proposals could expose local farming operations in the North Delta to new regulatory and legal requirements relating to the operation of private and district-owned water diversion facilities. Under these circumstances, a project that intentionally moves smelt into the northern Delta may well trigger State liability under a suit for inverse condemnation brought by affected landowners.

If projects similar to the interim measures are ever to be implemented, the lead agencies must first establish meaningful mechanisms to mitigate impacts on northern Delta water users who rely on the 1981 Contract. Possible mitigation includes safe harbor agreements that would indemnify water users for any Endangered Species Act violations, payment for fish screens and other physical protections for aquatic species, and agreements to fund the operation, maintenance and repair of these improvements in perpetuity. It is important to recognize that the northern Delta water users are, along with the fish, among those most affected by the operation of the state and federal projects that export water from the southern Delta. The 1981 Contract represents the State's commitment to keep the northern Delta community whole. In seeking to benefit the delta smelt and other fish species, the State must also continue to respect its commitments to the people of the northern Delta.

NDWA and its Board of Directors look forward to working with the Task Force on these matters of critical concern to the future of the Delta.

Very truly yours,

Henry Kuechler,
President, Board of Directors, NDWA

cc: Hon. Arnold Schwarzenegger
Governor, State of California

Hon. Mike Chrisman
Secretary of Resources

Lester Snow, Director
Department of Water Resources

Board of Directors, NDWA